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In the Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR MEDIA OF THE SOUTHEAST, INC., d/b/a
NAEGELE OUTDOOR ADVERTISING CO. OF RALEIGH-DURHAM,
PETITIONER

v.

CITY OF RALEIGH, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether an ordinance that requires petitioner to tear down billboards that cost hundreds of thousands of dollars to erect and to abandon valuable interests in land that are useful only for the purpose of maintaining signs, and that provides as "compensation" nothing more than a 5½ year delay in the effective date of the removal obligation, constitutes a taking of property without just compensation or a denial of due process, in violation of the Fifth and Fourteenth Amendments.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

The caption lists the names of all parties to this proceeding. Morris Communications Corporation is petitioner's parent company. Petitioner has no subsidiaries (except wholly owned subsidiaries) or affiliates.

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v.

CITY OF RALEIGH, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Major Media of the Southeast, Inc., d/b/a Naegele Outdoor Advertising Company of Raleigh-Durham, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 792 F.2d 1269. The opinion of the district court (App., *infra*, 11a-26a) is reported at 621 F. Supp. 1446.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1986, and a petition for rehearing was denied on July 17, 1986 (App., *infra*, 27a). On September 15, 1986, Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including December 14, 1986 (App., *infra*, 28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

> [No person shall] be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The billboard ordinance at issue in this case, Raleigh City Code §§ 10-2065, 2066, is reprinted in pertinent part at App., *infra*, 29a-32a.

STATEMENT

A. Background of the Raleigh Billboard Ordinance.

1. Petitioner Major Media of the Southeast, Inc., d/b/a Naegele Outdoor Advertising Company ("Naegele"), has been lawfully engaged in the outdoor advertising business in Raleigh, North Carolina for many years. Its billboards are located on property in commercial and industrial areas that is either leased to or, in a few instances, owned by Naegele for the purpose of maintaining outdoor advertising displays. Each such billboard was erected in full compliance with all applicable laws of the State of North Carolina and the City of Raleigh. C.A. App. 59.

In October 1983, when the ordinance at issue in this case was enacted, Naegele owned approximately 350 of the 485 billboard faces within Raleigh's zoning jurisdiction. C.A. App. 33. Although these structures were of several different types, sizes and heights, depending on the structure's age, location, and surroundings, the great majority were either 300 square foot "posters" or 672 square foot painted "bulletins". These dimensions are nationwide industry standard sizes suitable for display of preprinted designs received from national, regional and local advertisers. *Id.* at 34.

The cost of constructing Naegele's billboards, as well as the fair market value of each, differed substantially de-

pending upon composition and manner of construction. Some older creosote pole signs, which Naegele no longer constructs, cost only $2,000-$3,000 to erect. The initial investment in more modern steel structures, however, was in the $25,000-$35,000 range. C.A. App. 34-35. Most of these structures had an income-producing life well in excess of 20 years when the ordinance challenged here went into effect. *Id.* at 11. At the time the ordinance was adopted in 1983, the value of Naegele's investment in the signs doomed by the ordinance was approximately $3 million.[1]

Naegele's advertising signs are utilized to communicate views to the public with respect to a wide variety of matters of importance to business, civic, social, charitable, religious and educational organizations. In many instances, no equally satisfactory or effective alternative channels of communication are available to persons or entities desiring to use outdoor advertising as a means of presenting their message to large numbers of the public. In addition to advertising goods and services, for example, Naegele's displays in Raleigh have been used to publicize awareness campaigns of the Raleigh Chamber of Commerce and Better Business Bureau, to communicate messages from candidates for political office, to seek support for the return of the Iranian hostages, to promote adequate highway funding, to solicit contributions for crippled or disabled children, to denounce drug abuse, and to promote the United Way and a host of other charitable and social organizations. C.A. App. 32.

2. The City of Raleigh enacted its first comprehensive sign regulations on January 2, 1979. Ordinance No.

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[1] The replacement cost of the physical structure, while substantial, represents only a fraction of its value. Traditionally, market value in the billboard industry is calculated as a multiple (about three or four times) of annual revenues from each sign. Naegele's annual revenues in 1983 from the signs it will be required to remove under the Raleigh ordinance totaled nearly $1 million.

(1979) 982 TC 96 ("the 1979 Ordinance"). C.A. App. 369-404. These regulations were approved after substantial public discussion and consultation with numerous local groups and businesses, including Naegele. The 1979 Ordinance classified signs into "on-premise" and "off-premise" categories, based generally on whether they directed attention to an activity conducted on the premises where the signs were located. App., *infra*, 2a.

The 1979 Ordinance specified the areas of the city in which on-premise and off-premise signs would be allowed. In addition, most on-premise signs were limited to a maximum of 150 square feet, while off-premise signs were limited to a maximum of 675 square feet. Significantly, however, any billboards made nonconforming by the 1979 Ordinance were "grandfathered," *i.e.*, permitted to remain in use as long as they were not moved or materially altered in structure. C.A. App. 386. The city considered, but rejected, a proposal that would have required the removal of nonconforming signs after a so-called "amortization period." Upchurch Aff. 14.

Following adoption of the 1979 Ordinance, and in reliance on its provisions, Naegele invested substantial amounts for capital expenditures on its business activity within Raleigh. C.A. App. 65. Specifically, Naegele replaced and upgraded existing sign structures, acquired new locations, and constructed new billboards. In each instance, Naegele complied with the procedures and requirements of the 1979 Ordinance and obtained a permit from the city. *Id.* at 59.

3. In October 1983, Raleigh substantially revised its sign regulations in a manner that all but eliminates off-premise advertising structures as a medium of expression in the city. The new ordinance, Ordinance No. (1983) 210 TC 198, Raleigh City Code §§ 10-2065, 2066 ("the 1983 Ordinance"), prohibits off-premise signs in all areas of the city except those zoned Industrial 1 or Industrial 2; within those zones, the 1983 Ordinance restricts off-

premise signs to locations that are more than 400 feet in any direction from a residential zone, and limits the size of off-premise signs from the previous maximum of 675 square feet to 150 square feet alongside four-lane roads and 75 square feet alongside two-lane roads. App., *infra*, 2a. The 1983 Ordinance also increases the required spacing between off-premise signs from 200 to 1,000 linear feet. *Id.* at 31a-32a.

Unlike the 1979 Ordinance, which permitted nonconforming signs to remain in existence, the 1983 Ordinance requires the removal of *all* nonconforming off-premise signs within 5½ years from October 23, 1983, unless such removal is expressly prohibited by state statute. App., *infra*, 32a.[2] The 5½-year "amortization period" was

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[2] North Carolina General Statutes § 136-131.1 currently prohibits the required removal, without compensation, of outdoor advertising signs erected pursuant to a valid Department of Transportation permit adjacent to highways on the National System of Interstate and Defense Highways or on the Federal-aid Primary Highway System. The law is scheduled to expire in 1989. Of Naegele's 350 signs, 170 are adjacent to federally-aided highways. App., *infra*, 3a.

On-premise signs are subject to a different set of regulations. The 1983 Ordinance grandfathers existing nonconforming on-premise signs advertising commercial activity, but places size and other limitations on any new or altered on-premise signs. The message content of an on-premise sign is restricted to copy that "directs attention to the business, profession, commodity, attraction, service or entertainment conducted, offered, sold, manufactured, existing or provided at a location on the premises where the sign is located or to which it is affixed." App., *infra*, 29a.

Subsequent to commencement of this litigation, the city recognized that the 1983 Ordinance omitted certain essential protections for on-premise signs containing non-commercial messages, rendering it vulnerable under this Court's decision in *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981). It therefore adopted an amendment (Raleigh City Code § 10.2065.4) that permitted "any sign authorized under this chapter [to] contain non-commercial copy in lieu of any other copy." App., *infra*, 30a. Although the opinion of the court of appeals reflects some confusion on this

selected without any attempt to determine whether that length of time was reasonable in light of the actual value and useful life of the billboards that must be taken down or the investment expectations of the sign owners. Moreover, the ordinance provides no compensation of any kind for the forced destruction of these valuable income-producing properties.

As the court of appeals acknowledged (App., *infra*, 3a), the impact of the 1983 Ordinance on Naegele's outdoor advertising business is devastating. In April 1989, when the "amortization period" expires, Naegele will be required to tear down and remove 174 existing billboards made nonconforming by the Raleigh ordinance, out of a total of 180 billboards not adjacent to a federal-aid highway. *Ibid.* Although these signs have replacement costs of between $2,500 and $35,000 apiece and have fair market values well in excess of that (C.A. App. 34-35), and although the signs will retain a substantial useful life at the conclusion of the "amortization period" (*id.* at 11), they will have to be dismantled at Naegele's expense, after which they will be worth only a minimal salvage value. *Id.* at 354. In addition, Naegele's leasehold rights will be worthless, because the leases usually limit Naegele's use of the land to erection of signs and because many of the parcels on which billboards are situated have no other economically beneficial purposes. *Id.* at 508.[3]

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point (see *id.* at 5a & n.3), it seems reasonably clear that the 1983 Ordinance does not wholly deregulate non-commercial signs, but simply (as it says) allows them wherever commercial messages are permitted. Thus, insofar as Naegele's off-premise advertising business is concerned, it may not erect or maintain billboards containing non-commercial messages except where it could also display commercial messages.

[3] The parties stipulated that "Naegele cannot now relocate, replace, renew or improve any of its present billboards or erect new billboards except in compliance with the provisions of § 10-2066 of the Raleigh City Code or unless it is successful in obtaining a

B. The Litigation.

1. In July 1984, Naegele brought this action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of North Carolina, contending that the 1983 Ordinance violated its rights under the First, Fifth, and Fourteenth Amendments to the Constitution, as well as various provisions of North Carolina law. Following discovery, Naegele moved for summary judgment on its First Amendment claims; the company did not contend that its Fifth Amendment claims could be resolved summarily. App., *infra*, 13a. Raleigh cross-moved for summary judgment on all issues. *Id.* at 18a.

Naegele's summary judgment motion asserted several First Amendment defects, including that the 1983 Ordinance was impermissibly vague, that the ordinance granted undue discretion to city officials to classify speech as commercial or non-commercial, and that, even as amended (see note 2, *supra*), the ordinance favored commercial speech over non-commercial speech in violation of *Metromedia* v. *City of San Diego*, 453 U.S. 490 (1981). Naegele charged that the city's purported goals in enacting the ordinance—to promote traffic safety and to improve community aesthetics—were insubstantial and without record support. At a minimum, Naegele argued, a trial was required under *Metromedia* and *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984), to determine whether the city's concerns were substantial enough to justify the restrictions on speech and whether the ordinance was sufficiently tailored not to limit speech more than necessary to accomplish the city's goals. App., *infra*, 19a.

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variance by appeal to the Raleigh Board of Adjustment." They also stipulated, however, that if Naegele were to seek a variance, "no permit would be granted for any billboard that does not conform to the size, spacing, and location restrictions as set forth in the Raleigh City Code." C.A. App. 43. As a result, it can now be finally determined what the impact of the 1983 Ordinance is on Naegele's property interests.

Naegele's complaint also contended that the 1983 Ordinance violated the Takings Clause of the Fifth Amendment because it forced the removal of valuable private property for a public purpose without the payment of any compensation. In this regard, Naegele alleged that (i) its billboards were lawful when erected (Amended Complaint ¶ 12); (ii) it had invested substantial sums in developing its business in Raleigh (*id.* at ¶ 29); (iii) its investments were made "in reliance upon enactments reflecting assurance of the continued availability of outdoor advertising in the City of Raleigh" (*ibid.*); (iv) its billboards had a remaining useful life of at least 20 years and in most cases over 40 years (*id.* at ¶ 20); and (v) the effect of the ordinance was to destroy Naegele's business in Raleigh (*id.* at ¶ 25). See C.A. App. 59-65.

The district court denied Naegele's motion for summary judgment, granted summary judgment to Raleigh on the constitutionality of the ordinance, and ordered the action dismissed. App., *infra*, 11a-26a. In the court's view, the 1983 Ordinance satisfied the First Amendment because, as amended, it did not prefer commercial over non-commercial speech and was not impermissibly vague. *Id.* at 17a. In addition, the court held that the city was not required to have before it when legislating, or to present in court in defending its legislation, specific empirical evidence to support the reasonableness of the aesthetic and traffic safety justifications for the ordinance. Rather, the ordinance satisfied the First Amendment because Naegele had "presented no evidence tending to show that billboards do *not* negatively affect traffic safety" and aesthetics (*id.* at 20a; emphasis in original).

The district court also summarily rejected Naegele's Fifth Amendment Takings Clause claim. Without hearing any evidence on the value of Naegele's property, its investment-backed expectations, or the extent of its financial losses occasioned by the 1983 Ordinance, the court

held that "the five and one-half year amortization period, if reasonable, amounts to just compensation for Naegele's] loss." App., *infra*, 21a-22a. The court then concluded that the "amortization period" in the 1983 Ordinance was reasonable because it was longer than such periods upheld in other cases, because the period allowed recoupment of some of Naegele's investment in Raleigh, and because the company could engage in the billboard business elsewhere in North Carolina. *Id.* at 23a.

2. The court of appeals affirmed. App., *infra*, 1a-10a. Relying on *Metromedia*, it concluded that "a city may justifiably prohibit all off-premises signs or billboards for aesthetic and safety reasons" (*id.* at 6a). The court of appeals agreed with the district court that the amendment protecting non-commercial speech removed any ground for arguing that the 1983 Ordinance discriminated against non-commercial speech or was impermissibly vague (*id.* at 6a-7a).

With respect to the contention that the ordinance violated the Takings Clause, the court of appeals held that the "amortization period" comported with customary practice in zoning cases, was reasonable in duration, and did not "necessitate additional compensation." App., *infra*, 8a. Accordingly, the court sustained the grant of summary judgment upholding the Raleigh ordinance (*id.* at 9a-10a):

> While the theoretical principle cannot be said to vet 5½ years in any and all cases (we do not purport to hold that the owner of a sign can invariably recoup its investment in such a time span), nevertheless, in the present case, Naegele has not presented sufficient evidence to create a triable issue of fact on whether the period here was so unreasonable that it constituted a "taking" of Naegele's property.

REASONS FOR GRANTING THE PETITION

The billboard ordinance enacted by the City of Raleigh in 1983 destroys Naegele's property as completely and effectively as if the city had taken the property by eminent domain. In 1989, when the so-called "amortization period" expires, Naegele's billboards, which today are substantial income-producing assets, must be torn down and removed from the city, the physical structures being reduced to nothing more than scrap value. Furthermore, Naegele's interests in the parcels of land that serve as sites for its billboards will be rendered worthless. In return for this confiscation, Raleigh has offered no "compensation" other than a promise to delay the takings for 5½ years.

The Fourth Circuit's decision upholding the Raleigh ordinance against a Fifth Amendment challenge overlooks and cannot be squared with the repeated statements of this Court that "[t]he application of a general zoning law to particular property effects a taking if the ordinance * * * denies an owner economically viable use" of his property. *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980). See also *United States* v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 459 (1985). In light of the confusion in the lower courts concerning the precise contours of a "regulatory taking," the conflict among state supreme courts concerning the legality of billboard ordinances that mandate the removal of nonconforming uses without the payment of just compensation, and the substantial practical importance of the question presented to thousands of municipalities and businesses nationwide, review by the Court is plainly warranted.

A. This Court Has Recognized That Economic Regulation May So Diminish The Value Of Property As To Amount To A Taking.

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public

use without just compensation."[4] Because the essence of a "taking," for purposes of the Fifth Amendment, is "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign" (*Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1004-1005 (1984), quoting *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945)), the Court has not limited the Takings Clause to actual physical occupations or governmental expropriations of property. Rather, the Court has long recognized that governmental regulation that deprives property of its economic value may amount to a taking. As the Court remarked more than a half-century ago: "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Chicago, R.I. & P.R. Co.* v. *United States*, 284 U.S. 80, 96 (1931).

Of course, virtually every economic regulation restricts the use, and thereby diminishes the value, of the affected property. As Justice Holmes wrote for the Court in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922), "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power." But the "general rule," the Court announced in *Mahon*, is that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

In determining how far is "too far," this Court has engaged in "ad hoc, factual inquiries" (*Penn Central Transp. Corp.* v. *City of New York*, 438 U.S. 104, 124 (1978)) that "call[] as much for the exercise of judg-

[4] This prohibition applies against the states through the Due Process Clause of the Fourteenth Amendment. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 160 (1980); *Chicago, B. & Q.R. Co.* v. *Chicago*, 166 U.S. 226, 239 (1897).

ment as for the application of logic." *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979). Nevertheless, the Court has identified three factors bearing on the validity of a challenged regulation under the Takings Clause: (1) "the character of the governmental action," (2) "[t]he economic impact of the regulation on the claimant," and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. See also *Connolly* v. *PBGC*, 106 S. Ct. 1018, 1026 (1986); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979).

As to the first factor—the character of the governmental action—the Court has attached significance to whether the regulation destroys all, most, or only some of the "full 'bundle' of property rights" that an owner possesses. See *Allard*, 444 U.S. at 66. "[T]he destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Ibid.* In addition, the Court has focused on whether the regulation imposes restrictions that apply generally, so that the owner of property subject to the regulation shares in the benefits as well as the burdens of the exercise of governmental power. See *Agins*, 447 U.S. at 262; *Penn Central*, 438 U.S. at 131, 134-135.

As to the second factor—the economic impact on the property owner—the Court has weighed the diminution in value of the property affected. Although the Court's decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking' (*Penn Central*, 438 U.S. at 131), a taking occurs if the governmental action "has an unduly harsh impact upon the owner's use of the property" (*id.* at 127), works "a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land" (*Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14 (1984)), or "denies an owner economically viable use of his land" (*Agins*, 447 U.S. at 260). See *United States*

v. *General Motors Corp.*, 323 U.S. at 378 (a taking occurs if a regulatory action's "effects are so complete as to deprive the owner of all or most of his interest in the subject matter").[5]

As to the third factor—interference with distinct investment-backed expectations—the Court has held that some expectations of future development are entitled to protection under the Takings Clause, particularly where property has value only because of its future use. S *Penn Central*, 438 U.S. at 130 n.27. But "[a] 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 1005, quoting *Webb's Fabulous Pharmacies*, 449 U.S. at 161.

B. The Raleigh Billboard Ordinance Works A Regulatory Taking Of Naegele's Property In Violation Of The Takings Clause.

1. Judged by the foregoing standards, the 1983 Ordinance unquestionably constitutes a taking of Naegele's property. This Court recently summarized its approach to regulatory takings claims in *Riverside Bayview Homes*, stating unanimously that application of land-use regulations to a particular piece of property is a taking "if the ordinance * * * denies an owner economically viable use of his land." 106 S. Ct. at 459, quoting *Agins*, 447 U.S. at 260. The Raleigh billboard ordinance completely deprives Naegele of *all* economically viable use of its 174

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[5] See also *MacDonald, Sommer & Frates* v. *Yolo County*, 106 S. Ct. 2561, 2573 (1986) (White, J., dissenting) (claims of "denial of all economically feasible use of * * * property are certainly sufficient allegations of a regulatory taking to state a cause of action"); *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting) ("government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property").

billboards and accompanying leaseholds. Justice Stevens' comment on the billboard ordinance at issue in *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 543 (1981), is equally applicable here: "If the ordinance is enforced, * * * [a]ppellants' large and profitable outdoor advertising businesses will be destroyed." The Fifth Amendment prohibits government from doing that to private property, even for a worthy public purpose, without paying just compensation.

This conclusion is buttressed by consideration of the specific criteria discussed above. First, applying the initial *Penn Central* test and "focusing on the uses the regulations permit" (438 U.S. at 131), it would be hard to imagine a clearer case in which regulation has destroyed virtually the entire economic value of private property. Billboards are valuable because they can be used for expressive purposes. The 1983 Ordinance mandates that essentially all of Naegele's billboards subject to Raleigh's unencumbered legislative jurisdiction may no longer be utilized for those purposes within the city.[6] As a result, 174 existing billboards must be taken down; because they cannot simply be picked up and relocated, their only value will be as scrap.[7] By the same token,

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[6] Presumably because federal law requires the payment of just compensation for forced removal of existing signs alongside federally-aided highways (see 23 U.S.C. § 131(g)), Raleigh's ordinance does not require the removal of such signs. In addition, presumably to avoid opposition from the Raleigh business community, the ordinance does not require the removal of any on-premise signs. Thus, the 1983 Ordinance was possible only because it was structured to cost the public nothing and to limit its harm to property owners with no political power in the community.

[7] In granting summary judgment, the district court stated that "the city has no intention of seizing non-conforming billboards, and [Naegele] will be able to salvage at least parts of those structures and use them elsewhere." App., *infra*, 23a. The sole support offered for this erroneous assertion was the deposition of Donald Pierce, a Naegele official. But Pierce in fact stated that the signs, once taken down, would be "salvage material" (C.A. App. 354)—

Naegele's property interests in the parcels on which the billboards stand will be useless. See *Almota Farmers Elevator Whse. Co.* v. *United States*, 409 U.S. 470, 476-477 (1973).

Moreover, the economic impact of the 1983 Ordinance, measured by the diminution in value of Naegele's property, is devastating. In October 1983, Naegele had a large and profitable outdoor advertising business in Raleigh that was worth many millions of dollars. It owned several hundred billboards, each worth thousands of dollars. In 1989, solely as a result of Raleigh's billboard regulation, much of this property will become essentially worthless. What is more, the 1983 Ordinance also destroyed Naegele's reasonable investment-backed expectations. As noted above (see page 4, *supra*), Naegele substantially expanded and upgraded its investment in the billboard business in Raleigh in reliance on the 1979 Ordinance, which was a carefully crafted compromise that regulated permissible sizes and locations of billboards in the city and grandfathered nonconforming structures.

It should be noted in this regard that this case—unlike *Agins*, *Penn Central*, *San Diego Gas*, *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 105 S. Ct. 3108 (1985), or *Yolo County*—involves an *actual, existing, lawful use of property*, made nonconforming by a subsequently enacted (and wholly unanticipated) land use regulation. By the stroke of a legislative pen, Raleigh

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that they could be used "in constructing new signs from time to time. Steel, of course, always has salvage value" (*ibid.*). There was *no* evidence in the record that billboards could simply be moved to other locations. Indeed, the only evidence was to the contrary: each billboard represents an investment for planning and procurement, labor, taxes, freight, and equipment costs that cannot be transferred to another site. See *ibid.* (most signs are custom-made for their original location). The district court's confusion underscores the error in granting the city's motion for summary judgment on Naegele's takings claim.

has ordered the removal of valuable, income-producing properties from the city's commercial and industrial areas in order to achieve alleged aesthetic and traffic safety goals. If Raleigh had chosen to carry out this program by physically seizing and destroying the billboards, in an effort to create more open space, it would be frivolous to suggest that that action—even if an otherwise lawful exercise of regulatory power—would not constitute a taking requiring the payment of just compensation. See *Berman* v. *Parker*, 348 U.S. 26, 36 (1954). No different result should follow because the city instead has ordered Naegele to destroy the same property for the same purpose. See *San Diego Gas*, 450 U.S. at 652 (Brennan, J., dissenting).[8]

Finally, it is significant to the takings analysis that the 1983 Ordinance is not a typical zoning regulation, which applies non-discriminatorily to all landowners in a given area. As this Court has observed, zoning regulations generally raise no Takings Clause problems because even those landowners whose developmental plans are inhibited by a zoning ordinance are benefited by the fact that their neighbors' plans are similarly inhibited. See *Agins*, 447 U.S. at 262; *Penn Central*, 438 U.S. at 134-135. Not so with billboard ordinances. Regulations such as Raleigh's impose the *total* cost of "beautifying" the community on only a single property owner or small handful of owners. "The purpose of forbidding uncompensated takings of private property," however, "is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should

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[8] See also Tribe, *American Constitutional Law* 460 (1978):

> [F]orcing someone to stop doing things with his property—telling him you can keep it, but you can't use it—is indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else. Thus, a taking occurs in this ordinary sense when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value has been virtually destroyed.

be borne by the public as a whole.'" *Connolly* v. *PBGC*, 106 S. Ct. at 1027, quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). See also *Agins*, 447 U.S. at 260; *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980); 1 Anderson, *American Law of Zoning* § 6.72, at 528 (2d ed. 1976) "([t]he nonconforming user should not be required to pay more than a fair share of the cost of implementing a comprehensive plan for community development").[9]

In sum, this is not a case where, despite restrictive land use regulation, a property owner is being allowed to continue a present use of its property and to earn a reasonable return on its investment, as in *Penn Central*, 438 U.S. at 136.[10] Nor is this a case where a property owner

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[9] This case is unlike *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), or *Reinman* v. *City of Little Rock*, 237 U.S. 171 (1915), where the Court held that a city could order the closure of a common law nuisance—in *Hadacheck*, a brick manufacturing plant whose operations in a residential neighborhood "seriously incommoded" its neighbors, and in *Reinman*, a livery stable that emitted "offensive odors" and was "productive of disease"—without the payment of compensation. See *Penn Central*, 438 U.S. at 125, 133 n.30; *id.* at 145 n.8 (Rehnquist, J., dissenting). Far from posing a threat to the public health, safety, or morals, outdoor advertising serves as an important medium of public expression clothed with protections under the First Amendment. In any event, the city did not argue below that Naegele's billboards could be removed without compensation on the ground that they were a public nuisance. See also *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962) (upholding constitutionality of ordinance that had the effect of prohibiting further operation of a sand and gravel pit within town limits, but stating that governmental regulation may "be so onerous as to constitute a taking which constitutionally requires compensation" and noting that there was no evidence even remotely suggesting that the ordinance in that case reduced the value of any property).

[10] For example, a regulation that prohibited the advertising of cigarettes or liquor on billboards might reduce the potential profitability (and therefore value) of a company's signs without amounting to a taking, so long as other substantial economically productive uses of the property remained available. (We put to one side the First Amendment issues such a law would present.)

is being denied merely the possibility of future economic development, as in *San Diego Gas* or *Williamson County*.[11] Instead, "the government [has not] simply take[n] a single 'strand' from the 'bundle' of property rights: it [has] chop[ped] through the bundle, taking a slice of every strand." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), quoting *Allard*, 444 U.S. at 66.

2. If, as we contend, the 1983 Ordinance effects a taking of property for a public use, then the regulation violates the Takings Clause, because it does not provide for the payment of just compensation—or, in fact, for any compensation at all. The courts below disagreed, holding that "the five and one-half year amortization period * * * amounts to just compensation for [Naegele's] loss." App., *infra*, 21a-22a. See also *id.* at 3a (amortization period "was granted owners of non-conforming signs in lieu of any other form of compensation"). But neither court purported to explain how a delay of several years in taking someone's property could possibly constitute "just compensation" for that property. As this Court has observed, " 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970) (footnotes omitted). "Amortization," whatever the period chosen, gives a property owner *nothing* that he would not have had absent the taking.[12]

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[11] For example, a regulation that prohibited the erection of billboards in new areas would not ordinarily amount to a taking because it would not destroy a settled property interest or reasonable investment-backed expectation. (Again, we put to one side First Amendment considerations.)

[12] It also is irrelevant to the just compensation inquiry that Naegele may continue to operate its billboard business alongside federally-aided highways and in other cities in North Carolina. See App., *infra*, 23a. A government could hardly justify taking a

Indeed, the lower courts in this case appear to stand alone in concluding that an "amortization period" satisfies the constitutional requirement of just compensation. Other courts have relied on amortization provisions in upholding billboard ordinances, but they have done so on the wholly different (albeit erroneous) theory that a regulation that constitutes a reasonable exercise of the police power cannot, as a matter of law, effect a taking of property within the meaning of the Fifth Amendment. See pages 20-21, *infra*. These courts appear to hold that a billboard regulation requiring the removal of nonconforming uses is reasonable if it contains an "amortization period" of sufficient duration. See, *e.g.*, *Art Neon Co.* v. *City and County of Denver*, 488 F.2d 118, 121-122 (10th Cir. 1973), cert. denied, 417 U.S. 932 (1974).

This effort to avoid the mandate of the Takings Clause is equally flawed, because there is no inconsistency between a valid exercise of the police power and a regulatory taking requiring the payment of compensation. For example, the Court stated in *Agins*, 447 U.S. at 260, and has repeated several times since (see, *e.g.*, *Riverside Bayview Homes*, 106 S. Ct. at 459), that a regulatory taking occurs *either* if the regulation fails to advance a legitimate state interest *or* if it denies the property owner all economically viable use of his land. The clear implication is that a regulation can serve a wholly legitimate state interest and still be a taking. In cases such as *Penn Central*, there was no dispute that the city was engaged in regulation well within its police power (see 438 U.S. at 129); the Court nonetheless debated at length whether a regulatory taking had occurred, and three Justices in fact concluded that one had.[13]

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house without paying compensation on the ground that the owner could build an identical house elsewhere or that he already owns another, similar structure.

[13] See also *United States* v. *Security Industrial Bank*, 459 U.S. 70, 75 (1982); *Loretto*, 458 U.S. at 425; *Delaware, L. & W. R. Co. v. Morristown*, 276 U.S. 182, 193 (1928).

Whatever the constitutional or other basis for an "amortization period," therefore, it plainly cannot serve as a substitute for the payment of just compensation for a taking of property, as the courts below held. See, *e.g.*, the billboard removal section of the federal Highway Beautification Act, 23 U.S.C. §§ 131(e) and (g), which contains *both* a 5-year delayed-removal provision *and* a just compensation requirement.

C. The Constitutionality Of Billboard Removal Ordinances Is An Issue Of Substantial Practical Importance On Which The Lower Courts Are In Disarray.

The decisions of the lower courts exhibit substantial confusion and uncertainty concerning the legality of ordinances requiring the removal, without compensation, of billboards or other structures or uses made nonconforming by a land use regulation. The majority view appears to be that a restrictive zoning ordinance that forces the termination of a nonconforming use over a set period of time is an exercise of general regulatory powers, which will be upheld if reasonable. As mentioned earlier, these opinions are premised on the erroneous view that the valid exercise of a governmental body's police power and the exercise of the taking power are somehow mutually exclusive concepts.

For example, in *New Castle* v. *Rollins Outdoor Advertising Co.*, 475 A.2d 355 (Del. 1984), a case involving a challenge to a three-year billboard amortization ordinance, the Delaware Supreme Court remarked that it had to resolve a "direct conflict" between a municipality's right to engage in reasonable regulation and an individual's right not to have his property taken without compensation. The court held that the property owner's right had to give way because "the forced termination of a nonconforming use over a specified period of time is a reasonable exercise of police power and does not constitute a taking of property in violation of due process rights."

Id. at 359. Similarly, in *Donrey Communications Co.* v. *City of Fayetteville*, 280 Ark. 408, 660 S.W.2d 900 (1983), cert. denied, 466 U.S. 959 (1984), the Arkansas Supreme Court upheld a municipal ordinance that granted nonconforming billboard owners a four-year amortization period, stating that the reasonable exercise of police power does not constitute a taking of property. 660 S.W.2d at 905. And in *State* v. *Joyner*, 286 N.C. 366, 211 S.E.2d 320, appeal dismissed, 422 U.S. 1002 (1975), the North Carolina Supreme Court sustained the constitutionality of a zoning ordinance that forced a salvage yard operator to close his business within three years. The court held that "there is no distinction between requiring the discontinuance of a nonconforming use" and limiting the right of a landowner to modify, enlarge or extend a nonconforming use. 211 S.E.2d at 325, quoting *Los Angeles* v. *Gage*, 127 Cal. App. 2d 442, 459, 274 P.2d 34, 44 (1954).

Other courts have adopted a less rigid approach. In *Modjeska Sign Studios, Inc.* v. *Berle*, 43 N.Y.2d 468, 373 N.E.2d 255 (1977), appeal dismissed, 439 U.S. 809 (1978), for example, the New York Court of Appeals considered the constitutionality of a state statute requiring the removal of billboards after a 6½-year amortization period. The court held that the statute would not give rise to a taking unless the billboard owner were deprived of "all reasonable use of his property," that the "immediate removal of billboards without compensation in some instances might be an unconstitutional deprivation of property," and that an amortization period might well be an acceptable method of balancing public and private concerns. 373 N.E.2d at 260. It then remanded the case to allow the billboard owner an opportunity to prove at trial that its loss was "so substantial that it outweigh[ed] the public benefit gained by the legislation." *Id.* at 262. This opportunity, of course, was denied to Naegele when the district court granted Raleigh's motion for summary judgment.

A third group of courts has invalidated statutes and ordinances requiring the removal of nonconforming uses after an amortization period. The Missouri Supreme Court's decision in *Hoffman* v. *Kinealy*, 389 S.W.2d 745 (Mo. 1965), although not involving a billboard ordinance, plainly covers the instant situation (*id.* at 753; emphasis in original):

> To our knowledge, no one has, as yet, been so brash as to contend that such a pre-existing lawful nonconforming use of property might be terminated *immediately*. In fact, the contrary is implicit in the amortization technique itself which would validate a taking *presently* unconstitutional by the simple expedient of *postponing* such taking for a "reasonable" time. All of this leads us to suggest * * * that it would be a strange and novel doctrine indeed which would approve a municipality taking private property for public use without compensation if the property was not too valuable and the taking was not too soon, and prompts us to repeat the caveat of Mr. Justice Holmes in [*Mahon*, 260 U.S. at 416] that "[we] are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

To similar effect are *City of Akron* v. *Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953), which held that the right to continue to use one's property in a way that does not constitute a nuisance and that "was lawful at the time [the property] was acquired" was protected by the Ohio Constitution and the Fourteenth Amendment (116 N.E.2d at 700), and *Loundsbury* v. *City of Keene*, 122 N.H. 1006, 453 A.2d 1278 (1982), which held that "even when a valid public purpose exists," the application of an ordinance requiring the removal of nonconforming billboards after an amortization period "constitutes a 'taking' requiring the payment of just compensation." 453 A.2d at 1281. See also *L. Grossman &*

Sons v. *Town of Gilford*, 118 N.H. 480, 387 A.2d 1178 (1978). And in *Ailes* v. *Decatur County Area Planning Comm'n*, 448 N.E.2d 1057 (Ind. 1983), cert. denied, 465 U.S. 1100 (1984), the Supreme Court of Indiana struck down ordinances requiring the elimination of nonconforming uses without compensation on the ground that "an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law and an unreasonable exercise of the police power." 448 N.E.2d at 1060.

It is essential that this Court resolve the conflict among the lower courts and provide guidance concerning the permissible limits of zoning ordinances requiring the removal of billboards without payment of compensation.[14] The outdoor advertising industry has made investments in billboards and real estate that are worth billions of dollars nationwide. See, *e.g.*, *The Wall Street Journal*, Sept. 16, 1986, p. 10 (reporting that Metromedia, Inc. recently sold its outdoor advertising business for $710 million). Many municipalities currently have some form of billboard regulations requiring the uncompensated removal of nonconforming uses, several of which are the subject of pending litigation.[15] The Fourth Circuit's de-

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[14] Commentators as well as lower courts are in disagreement over the constitutionality of billboard regulation. See generally 1 Anderson, *American Law of Zoning* § 6.67, at 509 (2d ed. 1976) ("Judicial reaction to amortization ordinances has been mixed, but most courts have approved the technique"); *id.* at § 6.72, at 527 n.97 (citing law review articles reflecting "[a] broad spectrum of opinion concerning the fairness and efficiency of amortization"); Comment, *Constitutionality of Sign Amortization Ordinances*, 9 Urban Law Ann. 303 (1975).

[15] Cases filed in 1986 alone include *Georgia Outdoor Advertising, Inc.* v. *City of Waynesville*, No. A-C-86-52 (W.D.N.C. Nov. 14, 1986) (upholding Waynesville billboard ordinance); *Harris County Outdoor Advertising Ass'n* v. *City of Houston*, No. 86-8560 (Dist. Ct.

cision sustaining the Raleigh ordinance is bound to encourage other local governments to attempt similar confiscatory legislation, and to lead to even further litigation.

D. The Four Regulatory Takings Cases On The Court's Current Docket May Shed Further Light On The Correctness Of The Fourth Circuit's Decision.

We have demonstrated thus far that the decision below warrants plenary review because it resolves an important constitutional question in a manner that conflicts with pronouncements of this Court and other courts. At a minimum, however, the Court should hold this case pending its decisions in several other regulatory takings cases scheduled to be heard during the 1986 Term.

The Court recently has granted review in four cases dealing with the Takings Clause of the Fifth Amendment:

1. *Keystone Bituminous Coal Ass'n* v. *Duncan*, No. 85-1092, cert. granted, 106 S. Ct. 1456 (Mar. 24, 1986) (argued Nov. 10, 1986), involves a challenge to the constitutionality of a Pennsylvania statute and regulations that require coal mine operators to leave up to 50% of their coal in place for support of certain surface structures. In contending that the Pennsylvania scheme violates the Takings Clause, the petitioners rely on *Pennsylvania Coal Co.* v. *Mahon*, *supra*, which held that a similar state regulatory statute went "too far" in destroying private property rights and thus violated the

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Harris Co. Oct. 29, 1986) (invalidating Houston billboard ordinance); *French* v. *City of Appleton*, No. 86 CV 231 (Cir. Ct. Outagamie Co. Sept. 5, 1986) (invalidating Appleton billboard ordinance); *Ackerley Communications of Massachusetts Inc.* v. *City of Somerville*, No. 86-322-WD (D. Mass. filed Dec. 5, 1986); *Whiteco Metrocom, Inc.* v. *City of Tucson*, No. 86-589 TUC (D. Ariz. filed Oct. 17, 1986); *Primary Media Corp.* v. *City of Orlando*, No. 86-116-Civ-Orl (M.D. Fla. filed Mar. 7, 1986); and *National Advertising Co.* v. *City of Pompano*, No. 86-6466 Civ-Paine (S.D. Fla. filed Apr. 29, 1986).

federal Constitution. Pennsylvania defends its statute and regulations by arguing that they serve "important, broad public interests" and have only a "minimal impact on the companies' property rights."

2. *FCC* v. *Florida Power Corp.*, No. 85-1658, prob. juris. noted, 106 S. Ct. 2273 (June 2, 1986) (argued Dec. 3, 1986), involves an attack on the federal Pole Attachments Act, 47 U.S.C. § 224, which directs the Federal Communications Commission to ensure that the rates charged cable television companies for the right to attach cables to utility poles are just and reasonable. The utility contends that FCC orders lowering the rates imposed pursuant to contracts with cable operators amounted to a taking without just compensation. The federal government disputes that a taking occurred, but argues that even if the FCC's rate orders were viewed as a taking, there would be no violation of the Fifth Amendment because the rates provide just compensation.

3. *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, No. 85-1199, prob. juris. noted, 106 S. Ct. 3292 (June 30, 1986) (to be argued in January 1987), involves a challenge to a county flood control ordinance that prohibits all construction on certain property owned by the church. The church contends that the regulation (while perhaps a valid application of the police power) constituted a taking for which the county must pay just compensation, because the ordinance completely destroyed the economic value of the land. The county defends its regulation as "an essential and eminently reasonable exercise of the County's police power of a character which has never been regarded as an unconstitutional taking of property."

4. *Nollan* v. *California Coastal Comm'n*, No. 86-133, prob. juris. noted, 107 S. Ct. 312 (Oct. 20, 1986) (to be argued in February 1987), challenges a California statute providing that landowners must dedicate access across the beach area of their property to public use as a con-

dition on receiving a permit to construct, repair, or improve private property situated between the last public road and the ocean. The landowners contend that the regulatory order requiring that they grant the public an easement across their beach constitutes a taking of private property. The state responds by arguing that, "although the access condition caused a diminution in the value of the property, it did not deprive the owners of the reasonable use of the property."

Even these capsule summaries of the four cases demonstrate beyond question that the Court this Term will shed further light on the type or degree of regulation that constitutes a taking of property within the meaning of the Takings and Due Process Clauses. In particular, cases such as *Keystone* and *First English* may well require the Court to address the validity of the very assumption that underlies virtually all of the cases upholding billboard ordinances against constitutional attack—*i.e.*, that economic regulation amounting to a lawful exercise of the police power cannot, as a matter of law, effect a taking of property. In addition, the four takings cases almost certainly will require the Court to elaborate upon the three-factor approach to regulatory takings outlined above (see pages 10-13, *supra*).

Indeed, this case in many ways provides a far stronger basis than the pending cases for requiring the payment of just compensation for the destruction of property occasioned by governmental regulation. To begin with, the 1983 Ordinance totally destroys Naegele's property. *Keystone* and *First English*, by contrast, challenge regulations that merely limit the use that can be made of existing property, but preserve the status quo.

Furthermore, the statutes and ordinances involved in *Keystone* and *First English* were designed to deal with demonstrable and serious risks to the public safety. There can be little doubt about the dangers associated with

floods or the removal of all subsurface coal. It is therefore difficult to quarrel with the pressing public need for the regulations alleged to take property in those cases. Here, by contrast, the dangers said to arise from the existence of highway signs are far less significant and the benefits said to flow from their removal are far more speculative, and the governmental action at issue restricts expressive activity that enjoys some degree of special constitutional protection under the First Amendment.[16]

Finally, the underlying notion of the Takings Clause is that the public as a whole, and not just a few members of the public, should be required to pay for improvements designed to benefit everyone. See *Agins*, 447 U.S. at 260. As Justice Brennan explained in *San Diego Gas*, 450 U.S. at 656: "When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large." Whereas the benefits resulting from the regulations at issue in *Keystone* and *First English* would flow to only a small segment of the public (principally including the very people objecting to the regulations), the purported aesthetic and safety benefits anticipated from the elimination of billboards would be enjoyed by the entire populace. Ac-

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[16] See *City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S. Ct. 2034, 2038 (1986), quoting *Taxpayers for Vincent*, 466 U.S. at 803 n.22 ("This Court 'may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity.'"). If the district court had not aborted the evidentiary proceedings by granting the city's motion for summary judgment, Naegele would have attempted to show that billboards in industrial and commercial areas in fact have no adverse effect on traffic safety (see, *e.g.*, U.S. Dep't of Transp., Federal Highway Admin., *Analysis and Modeling of Relationships Between Accidents and the Geometric and Traffic Characteristics of the Interstate System* 20 (1969)) and cause little additional aesthetic harm given the proliferation of authorized signs in such areas. The 1983 Ordinance, for example, allowed more than 12,000 signs to remain standing in Raleigh. C.A. App. 370.

cordingly, it is more justifiable to make everyone pay for those benefits.

In sum, if the Court finds that the regulations in *Keystone* or *First English* effected a taking of property, *a fortiori* the Fourth Circuit's decision in this case would require further consideration. Certainly the Court ought not make final the many millions of dollars of injury inflicted on Naegele by the Raleigh ordinance while it is simultaneously in the process of a major reexamination of the application of the Takings Clause to governmental regulation.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to hold the petition pending its decisions in the four Takings Clause cases discussed at pages 24-28 and then dispose of it as appropriate in light of those decisions.

Respectfully submitted.

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DECEMBER 1986

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2093

MAJOR MEDIA OF THE SOUTHEAST, INC.,
d/b/a Naegele Outdoor Advertising Company
of Raleigh-Durham,
Appellant

v.

CITY OF RALEIGH,
Appellee

On Appeal from the United States District Court
for the Eastern District of North Carolina
(D.C. Civil No. 84-796)

Argued April 7, 1986

Filed June 12, 1986

Before: MURNAGHAN and WILKINSON,
Circuit Judges and
BUTZNER, Senior Circuit Judge

MURNAGHAN, Circuit Judge:

I.

Major Media of the Southeast, Inc., doing business as Naegele Outdoor Advertising Company ("Naegele") ap-

The original version of what became the October 1983 ordinance, as proposed, included a provision which stated that "[n]othing in this ordinance or in Section 10-2065 of the Raleigh City Code shall apply to non-commercial signs." The language was proposed because it was recognized that there might be "significant legal problems" if the ordinance was construed to favor commercial over non-commercial speech. *See Metromedia, Inc. v. San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981).

The proposed section excepting non-commercial speech from the scope of the ordinance's restrictions, however, was not included in the ordinance as initially passed. Naegele moved for summary judgment on December 3, 1984 on the grounds that the ordinance as passed was unconstitutional.[1] On December 4, 1984, the omission of the provision relating to non-commercial speech was brought to the attention of the Raleigh City Council; the Council met and enacted Ordinance 450 TC 228, which amended the October 1983 ordinance to include a provision which stated that "[a]ny sign authorized in this chapter is allowed to contain non-commercial copy in lieu of any other copy." The ordinance does not define "commercial" or "non-commercial" copy.[2]

Under the procedures specified by the Ordinance, if a sign (whether non-commercial or commercial) is to be

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[1] In fact the parties stipulated on December 3, 1984 that "[u]nder the Raleigh City Code in effect on the date of this stipulation, as contained in Exhibit A, an on-premise sign can contain copy solely relating to the business, etc. conducted on the premise where the sign is, but the use of otherwise identical on-premise signs to carry other messages is generally prohibited."

[2] The district court found that the amendment was passed by the defendant "to eliminate any potential constitutionality problems." Although the amendment is not free from potential ambiguity, it seems to allow non-commercial copy to be placed on any on-premise sign (or any permitted off-premise sign) instead of commercial copy.

erected, a permit must be requested and the copy or contents of the proposed sign display must be submitted to the relevant authorities. An inspector will then examine the application, classify the sign on the basis of its contents, and grant or deny the permit, depending on whether the sign is a permissible one for the zone where it is to be located. If a sign is proposed for an area where neither on-premise nor off-premise signs are allowed, the inspector must determine whether the copy is commercial or non-commercial. If it is non-commercial, it should automatically be allowed.[3] Because no occasion has arisen for an inspector to make such a determination, any potential abuse of these procedures must await whatever challenge, if any, may be made at a later date.

After the ordinance was modified to except non-commercial signs from regulation by the City, Naegele renewed its motion for summary judgment before the district court. The City also moved for summary judgment. On October 16, 1985 the district court entered an order granting summary judgment in favor of the City. Naegele had contended before the court that the ordinance was vague, standardless and a content-based infringement of its first amendment rights and that it gave the City unguided enforcement discretion, exceeding legitimate police power. Naegele also contended that the ordinance, as modified, preferred commercial over non-commercial speech in violation of *Metromedia, supra.*

The district court, in granting summary judgment in favor of the City, denied Naegele's contentions, and found that the Ordinance as modified did not offend *Metromedia* nor was it vague and standardless. The court determined that Naegele had not shown that there were any material questions of fact relating to the propriety of

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[3] Although both parties have argued this is the effect of the ordinance, it might also be read to exclude off-premise signs entirely in some areas, regardless of their contents.

the City's justification for the Ordinance on safety and aesthetic grounds. The court also found that Naegele's contention that the 5½ year amortization or grace period violated the taking clause of the Fifth Amendment (made applicable through the Fourteenth Amendment) was baseless. The court held that under the North Carolina law such an amortization period was valid if it were reasonable and amounted to just compensation. *State v. Joyner*, 286 N.C. 366, 375, 211 S.E.2d 320, 325 (1975), *appeal dismissed*, 422 U.S. 1002, 95 S.Ct. 2618, 45 L.Ed.2d 666 (1975). The district court held that the reasonableness of an amortization period was an appropriate matter for summary judgment determination. *See R.O. Givens, Inc. v. Town of Nags Head*, 58 N.C.App. 697, 294 S.E.2d 388 (1982), *cert. denied and appeal dism'd*, 307 N.C. 127, 297 S.E.2d 400 (1982). Under North Carolina law, the amortization period specified in the October 1983 Ordinance was reasonable.

II.

The Supreme Court having determined in *Metromedia, supra*, that a city may justifiably prohibit all off-premise signs or billboards for aesthetic and safety reasons, our discussion of Naegele's challenge to the Raleigh ordinance will be brief. The element of the San Diego sign ordinance found offensive to the First Amendment in *Metromedia*—the preference of commercial over noncommercial speech—was removed by the amendment passed by the Raleigh City Council on December 4, 1984. Whatever the effect of the ordinance before amendment, the ordinance now in effect does not run afoul of the First Amendment since it does not treat commercial speech more favorably. Because Raleigh's justifications for its ordinance are virtually the same as those enunciated by San Diego in *Metromedia, supra*, 435 U.S. at 509-10, 101 S.Ct. at 2893, we also find, as in *Metromedia*, that the ordinance does not impermissibly burden commercial speech.

III.

Naegele next contends that the ordinance is vague and contains no standard for guidance as to prohibited and allowable conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). We cannot agree. Although the ordinance provides no definition of "commercial" or "non-commercial" speech, sufficient guidance is given for such determination by City officials by the various decisions of the Court relating to billboards and commercial speech. We agree with the district court that "no codification of these terms is necessary, since the Supreme Court has already defined them." *See Central Hudson Gas & Elec. v. Public Service Comm'n.*, 447 U.S., 557, 561, 100 S.Ct. 2343, 2348, 65 L.Ed.2d 341 (1980). In *Central Hudson Gas*, the Court stated that commercial speech was "expression related solely to the economic interests of the speaker and its audience." Although an occasional marginal case might arise raising the question of whether on the particular facts the definition of commercial speech would be correct, such an infrequent possibility should not in itself justify a generalized charge that the ordinance itself is vague, given the guidance afforded by court decisions in the area.

IV.

Naegele next contends that the Raleigh ordinance, even as amended in December 1984 to remove non-commercial speech from the purview of its regulations, still is written in such a way as to prefer commercial over non-commercial speech in violation of *Metromedia*. Naegele predicts that the owners of the property on which "on premise" signs are placed will not allow placement of signs on their property or premises which contain non-commercial copy. Even if the contention should prove to be true, it derives from decisions of the individual property owners. It has nothing to do with the Raleigh

ordinance, itself, which by its very terms does not affect non-commercial signs. The owners of such premises are free to place or to refrain from placing the non-commercial messages of others on their premises. *See Pacific Gas and Electric Co. v. P.U.C. of California*, —— U.S. ——, 106 S.Ct. 903, 910-11, 89 L.Ed.2d 1 (1986).

As we have previously ruled, the relevant ordinance for consideration here is that which includes the December 1984 amendment, not the October 1983 ordinance which inadvertently omitted the provision excepting non-commercial signs. It is implausible indeed that an ordinance containing restrictions amended to *exclude* non-commercial speech altogether from the ambit of the ordinance can be said to burden such speech.

V.

The Raleigh ordinance's 5½ year "amortization" period, perhaps more correctly called a grace period, allowing non-conforming signs to remain for 5½ years, is a familiar procedure in zoning cases like the present one. The period allowed by the City gave the owners of non-conforming signs a time in which their non-conforming use could continue and further allowed them a period during which they could recoup their investment. Such a course allows for a "middle ground" between summary termination of a non-conforming use and indefinite continuance of such a use. *Joyner, supra*, 286 N.C. 372-73, 211 S.E.2d at 324, citing 1 Anderson, American Law of Zoning, § 6.65, 446-47 (1968). Such amortization provisions have generally been held by courts not to necessitate additional compensation, if they are " 'reasonable in the light of the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner.' " *Id.* 286 N.C. at 374, 211 S.E.2d at 325, quoting *Harbison v. Buffalo*, 4 N.Y.2d 553, 562-63, 176 N.Y.S.2d 598, 605, 152 N.E.2d 42, 47 (1958). The

North Carolina Supreme Court held in *Joyner* that such an amortization provision was not *per se* unconstitutional which allowed only three years for removal of a non-conforming use. *Id.*

The district court also overruled Naegele's objection that determination of the reasonableness of such a provision was inappropriate for summary judgment. The district court noted that the factors which must be considered in order to determine the reasonableness of the grace period "include the length of the period and whether the public gain achieved outweighs the private loss suffered by owners of the non-conforming uses." *See Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977), *appeal dism'd*, 439 U.S. 809, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978). As the district court observed, other courts have held that shorter "amortization" periods were "reasonable." Several courts have made such determinations on summary judgment. In *R.O. Givens, Inc. v. Town of Nags Head*, 58 N.C.App. at 702, 294 N.E.2d at 391, the North Carolina Court of Appeals found a 5½ year amortization period reasonable in light of *Joyner*. It was stated that the sign owners were not allowed to amend their complaint and that they were appealing from that order indicating the issue was one of law, ripe for decision rather than one of fact. *Id.* 294 N.E.2d at 390.

The second case cited by the district court as deciding the issue of reasonableness of amortization on summary judgment is *Donrey Communications Co. v. City of Fayetteville*, 280 Ark. 408, 660 S.W.2d 900 (1983), *cert. denied*, 466 U.S. 959, 104 S.Ct. 2172, 80 L.Ed.2d 555 (1984). In *Donrey*, the Arkansas Supreme Court affirmed a lower court's determination on summary judgment that a four year amortization period was reasonable.

While the theoretical principle cannot be said to vet 5½ years in any and all cases (we do not purport to hold that the owner of a sign can invariably recoup its invest-

ment in such a time span), nevertheless, in the present case, Naegele has not presented sufficient evidence to create a triable issue of fact on whether the period here was so unreasonable that it constituted a "taking" of Naegele's property.

The order of the district court is, accordingly,

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Civil Action No. 84-796

MAJOR MEDIA OF THE SOUTHEAST, INC.,
d/b/a Naegele Outdoor Advertising Company
of Raleigh-Durham,

Plaintiff

v.

CITY OF RALEIGH,

Defendant

ORDER

Filed October 16, 1985

DUPREE, District Judge.

This action arose as a result of amendments made to the Raleigh City Code in 1983 regarding the regulation of billboards and signs within the city. These regulations had initially been enacted in 1979 and had permitted off-premise signs to be considerably larger than on-premise signs and also permitted off-premise signs to change their copy as frequently as desired.[1] The 1983 amendment substantially altered the regulations for off-premise signs. It reduced the number of zoning classifications in which billboards are allowed and reduced the amount of square

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[1] The regulation regarding on-premise signs is Raleigh City Code § 10-2065. The off-premise regulations are contained in Section 10-2066.

footage permissible per sign. It also provided for a five and one-half year amortization period from October 18, 1983 before any non-conforming signs would be removed.

Plaintiff subsequently brought this action challenging the constitutionality of the new ordinance. During discovery, it was discovered that a section of the ordinance presented to the City Council had been left out of the amendments. That section, which was to be placed in Section 20 of Raleigh City Code § 10-2066, provided as follows:

> Nothing in this ordinance or in 10-2065 of the Raleigh City Code shall apply to non-commercial signs.

As it turns out, this section was extremely important, for without it Section 10-2065 could be construed to be unconstitutional, because it would give commercial speech greater preference than non-commercial speech. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the Supreme Court found a similar ordinance to be unconstitutional on exactly the same grounds.

Relying on this case, plaintiff filed a motion for summary judgment seeking to have the ordinance declared unconstitutional as a matter of law. However, on the same day that plaintiff filed its motion defendant, seeking to eliminate any potential constitutionality problems, substantially amended the ordinance. Of particular import is Section 4, which amends Section 10-2065 to provide as follows:

> Section 10-2065.4 Permitted Signs.
>
> Any sign authorized in this chapter is allowed to contain noncommercial copy in lieu of any other copy.

Because plaintiff in its complaint sought only declaratory and injunctive relief, the court concluded that any ruling on the constitutionality of Raleigh's ordinance would

have to be based on the ordinance as amended on December 4, 1984. The court then gave the parties additional time to seek further discovery and to subsequently resubmit their motions for summary judgment with such further memoranda and materials as they deemed necessary. Discovery has been completed, the parties have filed their motions, and the action is now ripe for disposition.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

In its memorandum in support of its motion for summary judgment, plaintiff sets out two general grounds why the Raleigh City Code as it relates to signs is unconstitutional. First, plaintiff asserts that it is a vague, standardless, content-based infringement on plaintiff's First Amendment right to freedom of speech. Second, plaintiff contends that the Code violates due process because it gives city officials unguided enforcement discretion which exceeds the zoning power given to municipalities by the state legislature.[2]

However, both of these contentions center on the plaintiff's assertion that defendant has failed to adequately define the terms "commercial" and "non-commercial" as they relate to signs. As a result, it argues, non-commercial speech may be improperly restricted in violation of the First Amendment and billboard inspectors may be given unbridled discretion to violate plaintiff's due process rights by determining what speech is permitted and what is not. These contentions will be addressed seriatim.

1. *First Amendment*

In *Metromedia*, the Supreme Court addressed the question of what degree of speech could be regulated by a city

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[2] Plaintiff also argues that the part of the Code which is unconstitutional is not severable from other parts relating to signs and that consequently the whole section relating to signs must be deemed unconstitutional. This argument is addressed separately on pages [24a] through [25a], *infra*.

when enacting an ordinance limiting the use of signs within the city limits. San Diego's ordinance permitted on-site commercial advertising but forbade other commercial advertising (off-site signs) and non-commercial signs unless permitted by one of the ordinance's specified exceptions. A plurality of the Supreme Court ruled the statute unconstitutional because it improperly gave on-site commercial advertising preference over non-commercial advertising.

> Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of non-commercial speech to evaluate the strength of, or distinguish between, various communicative interests. . . . To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

453 U.S. at 514-15, 101 S.Ct. at 2896 (citations omitted).

As stated before, plaintiff argues that even with the recent amendments, the Raleigh City Code as it relates to signs is still in violation of the First Amendment, due to the fact that it fails to define or provide any guidelines for the interpretation of the terms "commercial" and "non-commercial" as used in the city's sign regulations. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). In support of this contention, plaintiff points to the depositions of several city sign inspectors who gave varying interpretations of the two terms. Watkins Deposition at 43-48, 140-42; Strickland Deposition at 11, 22-25; Parker Deposition at 17; Wiggins Deposition at 8, 15-17; Barber Deposition at 11-13.

In response, defendant asserts first that no codification of these terms is necessary, since the Supreme Court has already defined them. In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,

447 U.S. 557, 561, 100 S.Ct. 2343, 2348-49, 65 L.Ed.2d 341 (1980), commercial speech was defined as being "expression related solely to the economic interests of the speaker and its audience." Defendant asserts that it would be improper for the city to attempt to give the term some other meaning. Defendant also contends that the statements given to plaintiff's counsel by the city's inspectors in response to hypothetical questions should be given little consideration at this time. These inspectors have not been given any instruction on the new ordinance because no necessity for interpretation has arisen. Watkins Deposition at 43. Defendant contends that it would be unfair to find the ordinance unconstitutional simply because the individual inspectors have not been instructed prior to any inspections as to how it should be interpreted.

The court must agree with these assertions. Where the courts have provided a city with specific guidelines with regard to the definition of applicable terms, the city need not include those definitions in its ordinance. The Supreme Court's discussion of commercial speech in *Central Hudson* should provide defendant with those guidelines. Furthermore, the Court expanded on this definition in *Metromedia* when it implicitly acknowledged as proper the City of San Diego's definitions of on-site and off-site commercial signs. San Diego defined an on-site commercial sign as "a sign advertising goods or services available on the property where the sign is located," and an off-site commercial sign as "a sign on a building or other property advertising goods or services produced or offered elsewhere." 453 U.S. at 503, 101 S.Ct. at 2890. The plurality expressly ruled that insofar as it regulated commercial speech the San Diego ordinance met the requirements of *Central Hudson*. *Id.* at 512, 101 S.Ct. at 2895.

Plainitff points to Justice Brennan's concurring opinion in *Metromedia* in support of its position that city

officials should not be given the right to determine whether a proposed message is commercial or non-commercial. 453 U.S. at 536-37, 101 S.Ct. at 2907-08. However, as defendant points out, Justice Brennan was in the minority on this point. Seven justices (four in the plurality and three dissenters) concluded that San Diego had the right to regulate the size and spacing of all commercial signs. None expressed any problems with the city's ability to distinguish between commercial and non-commercial advertising.

Thus, this court must similarly find that defendant's failure to define the terms "commercial" and "non-commercial" as they relate to signs does not render the sign ordinance unconstitutionally vague. These terms have been adequately defined in prior court decisions and those definitions need not be repeated in the ordinance to render it constitutional.

In a similar vein, plaintiff argues that even after the December, 1984 amendments to the ordinance, commercial signs still are treated more favorably than non-commercial ones in violation of the Supreme Court's ruling in *Metromedia*. First, they contend that an on-premise commercial sign is permitted merely by meeting the definition of on-premise sign,[3] while a non-commercial sign must also meet the approval of a zoning inspector, who, "in his unguided discretion, may wrongly determine that the proposed message is commercial . . . amounting to a prior restraint." Memorandum in Support of Plaintiff's Motion for Summary Judgment, filed July 22, 1985, p. 41. Second, plaintiff argues that non-commercial on-premise signs are subordinated to commercial signs because, "before a non-commercial message may be erected on a business premise, the structure to which that message is to be attached must independently qualify as an on-premise sign." Plaintiff's Memorandum, p. 42.

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[3] Raleigh City Code § 10-2002.

Neither of these contentions entitle plaintiff to relief. First, for the reasons set out above, zoning inspectors have not been given unbridled discretion to decide whether a particular sign is commercial or non-commercial. These inspectors have not yet been instructed on this issue because the need for such inspections has not yet arisen.

Plaintiff's second contention also does not entitle it to relief. The ordinance as amended gives no preference to commercial signs. Also, under the ordinance, the "structure to which the message is to be attached" need not *qualify* as an on-premise sign; rather, the structure must be *entitled* to have an on-premise sign. However, the city expresses no preference as to whether the message on the on-premise sign is commercial or non-commercial.

Plaintiff also argues that the ordinance is vague because it does not address the question of commercial signs offering real property for sale in residential districts. However, the Supreme Court has held that such signs are so unique, special and necessary and that alternative methods of selling residential real property are so inadequate that they cannot be prohibited. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977). The state has acknowledged this exception and has provided in Section 2301.3(b) of the North Carolina Building Code that such signs are permissible so long as they are no more than fifteen square feet in size. Thus, it was not necessary for defendant to make any further provision in the Raleigh City Code regarding such signs.

Therefore, for the reasons set out herein, plaintiff's motion for summary judgment on the grounds that the Raleigh City Code as it relates to signs violates the First Amendment right to freedom of speech is denied.

2. *Due Process*

Plaintiff's due process claim again raises the argument that zoning inspectors are given too much discretion in

determining whether a sign is commercial or non-commercial. However, the court has already found that such is not the case. Accordingly, plaintiff's motion for summary judgment on due process grounds must also be denied.

Accordingly, for the reasons set out herein, plaintiff's motion for summary judgment is denied.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In support of its motion for summary judgment, defendant argues that the facts as set out hereinbefore show that the ordinance, as amended in December, 1984, is constitutional as a matter of law. Additionally, defendant asserts that plaintiff's challenge to the constitutionality of Section 10-2065 is barred by the applicable statute of limitations. In response, plaintiff asserts that defendant has waived the statute of limitations and that genuine issues of fact remain regarding whether defendant has adequately considered traffic safety and aesthetics, and whether the amortization period for removal of nonconforming signs is a reasonable exercise of the city's police power.

1. *Statute of Limitations*

Defendant contends that plaintiff's challenge to the provisions of Section 10-2065 is barred by the nine-month statute of limitations set out in Session Laws 1981, c. 891, s. 10. However, defendant did not raise this defense until it filed its memorandum in support of its motion for summary judgment on July 22, 1985. This motion was filed more than ten months after defendant's original answer was filed. An assertion that a claim is barred by the statute of limitations is an affirmative defense and must be included in the defendant's answer. Rule 8(c), F.R.Civ.P. Failure to do so constitutes a waiver of that defense. *Alexandria Hospital v. Heckler*, 586 F.Supp. 581

(E.D.Va.1984). Thus, defendant has failed to timely raise the defense of statute of limitations, and has given no reason for this failure. Therefore, it has waived the defense of statute of limitations, and its motion for summary judgment on those grounds must be denied.

2. *Traffic Safety and Aesthetics*

In support of its contention that these factors were not adequately considered, plaintiff asserts that no objective research or study was conducted by the defendant to determine the present impact of advertising signs in the city, nor did the city rely on any research conducted at other locations. Defendant also has failed to present evidence of one instance where a billboard caused an automobile accident. Maness Deposition at 223-30.

Nevertheless, the court believes that there remain no material questions of fact with respect to this issue. No empirical studies are necessary for reasonable people to conclude that billboards pose a traffic hazard, since by their very nature they are designed to distract drivers and their passengers from maintaining their view of the road. *See County of Cumberland v. Eastern Federal Corporation*, 48 N.C.App. 518, 524, 269 S.E.2d 672, 676, *petition for discretionary review denied*, 301 N.C. 527, 273 S.E.2d 453 (1980). Furthermore, defendant did engage in public hearings at which citizens expressed their concern about the traffic hazard billboards pose.

The question of traffic safety is also an issue generally left to the discretion of local officials. As the Supreme Court said in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949),

> [w]e would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such

> a relation. And nothing has been advanced which shows that to be palpably false.

Id. at 109, 69 S.Ct. at 465, *quoted with approval in Metromedia, supra*, 453 U.S. at 509, 101 S.Ct. at 2893. Similarly, plaintiff in this action has presented no evidence tending to show that billboards do *not* negatively affect traffic safety.

With regard to aesthetics, a quote of Justice White's opinion in *Metromedia* is perhaps most appropriate.

> It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an "esthetic harm." San Diego, like many States and other municipalities, has chosen to minimize the presence of such structures. Such esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose. But there is no claim in this case that San Diego has as an ulterior motive the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself.

453 U.S. at 510, 101 S.Ct. at 2894 (footnotes omitted).

As the Supreme Court found with respect to the City of San Diego, this court has concluded that Raleigh's sign ordinance was not intended to limit certain forms of protected speech. Rather, it is a legitimate effort on the part of the City Council to promote an important public interest in maintaining traffic safety and the aesthetic appearance of the city.[4]

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[4] Defendant also points out that the sign ordinance is not the only project underway designed to improve the city's appearance. The city has also engaged in landscaping projects, sponsored the preservation of historic buildings, attempted to reduce litter, enacted an ordinance regulating placement of newsracks, and attempted to have future power lines placed underground. Affidavit of Ken Maness, dated December 20, 1984.

Not all legislative decisions warrant or are even capable of objective empirical studies. Defendant's ordinance limiting the size and spacing of on-premise and off-premise signs within the city's zoning jurisdiction was one such decision. Furthermore, "any exercise by a municipality of its police power is presumed valid, and when the reasonableness of an ordinance is debatable, judicial discretion gives way to legislative judgment." *Goodman Toyota, Inc. v. City of Raleigh*, 63 N.C.App. 660, 664, 306 S.E.2d 192, 194 (1983), *petition for discretionary review denied*, 310 N.C. 477, 312 S.E.2d 884 (1984). Absent more showing than has been made here, the court will not question defendant's expressed motives of improvement of traffic safety and aesthetics. *See A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 214, 258 S.E.2d 444, 449 (1979).

3. *Amortization Period*

Raleigh City Code § 10-2066.4 provides a five and one-half year amortization period for removal of all off-premise signs which do not conform to the Code as amended in October, 1983. Plaintiff first contends that no amortization period can amount to just compensation so as to come within the requirements of the Fifth and Fourteenth Amendments. However, the North Carolina Supreme Court has found otherwise. In *State v. Joyner*, 286 N.C. 366, 375, 211 S.E.2d 320, 325, *appeal dismissed*, 422 U.S. 1002, 95 S.Ct. 2618, 45 L.Ed.2d 666 (1975), the court followed the majority of other jurisdictions in the country, holding "that the provisions for amortization of nonconforming uses are valid if reasonable, and reject[ing] the *per se* rule holding all amortization provisions unconstitutional." Furthermore, plaintiff has pointed to no case or statutory law supporting the *per se* rule, and this court must therefore conclude that the five and one-half year amortization period, if reasonable, amounts to just compensation for plaintiff's

loss. *See also* 1 Anderson, American Law of Zoning, Section 6.65, 446-47 (1965).

Plaintiff next contends that summary judgment is not proper because the court cannot determine at this time that the amortization period set out in the Code is reasonable as a matter of law. The court disagrees. The factors to be considered when determining whether a particular amortization period is reasonable include the length of the period and whether the public gain achieved outweighs the private loss suffered by owners of the nonconforming uses. *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977), *appeal dismissed*, 439 U.S. 809, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978). With respect to the length of the amortization period, numerous courts have ruled that much shorter periods were reasonable. *Donrey Communications Company, Inc. v. City of Fayetteville, Arkansas*, 280 Ark. 408, 660 S.W.2d 900 (1983), *cert. denied*, 466 U.S. 959, 104 S.Ct. 2172, 80 L.E.2d 555 (1984) (four-year period); *State v. Joyner*, *supra* (three years); *Village of Gurnee v. Miller*, 69 Ill.App.2d 248, 215 N.E.2d 829 (1966) (three years); *Naegele Outdoor Advertising Company v. Village of Minnetonka*, 281 Minn. 492, 162 N.W.2d 206 (1983) (three years); *Spurgeon v. Board of Commissioners of Shawnee County*, 181 Kan. 1008, 317 P.2d 798 (1952) (two years); *Standard Oil Company v. Tallahassee*, 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892, 71 S.Ct. 208, 95 L.Ed. 467 (1950) (one year); *McKinney v. Riley*, 105 N.H. 249, 197 A.2d 218 (1964) (one year); *City of Seattle v. Martin*, 54 Wash.2d 541, 342 P.2d 602 (1959) (one year).

In addition, in *R.O. Givens, Inc. v. Town of Nags Head*, 58 N.C.App. 697, 294 S.E.2d 388, *cert. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982), the North Carolina Court of Appeals reversed a decision of the trial court and held that a town ordinance prohibiting off-premise commercial signs and providing for a five and one-half

year amortization period was reasonable as a matter of law. The Supreme Court of Arkansas also ruled in *Donrey, supra,* that defendant's amortization period was reasonable as a matter of law. Finally, the constitutionality of a ninety-day amortization provision in Raleigh City Code § 10-2065.6 regarding non-conforming on-premise windblown and portable signs in the City of Raleigh was upheld in *Goodman Toyota v. City of Raleigh, supra.* Based on these cases, the court concludes that the five and one-half year amortization period set out in Raleigh City Code § 10-2066.4 is reasonable as a matter of law.

Furthermore, the balance of benefit to the public versus harm to the plaintiff favors the city as well. Plaintiff certainly may lose income as a result of the ordinance. However, the purpose of the amortization provision is to allow a party to recoup some of their investment, not to repay them for potential future income which is lost as a result of the city's actions. Furthermore, plaintiff's argument that its business will be ruined by this ordinance is suspect, at best. First, plaintiff's business is not limited to the City of Raleigh, but covers all of eastern North Carolina with at least seven hundred sign structures located in some fifty-two cities and communities. Pierce Deposition at 6, 59, 67. Second, many of plaintiff's lease agreements contain provisions which would relieve plaintiff of any obligations under the lease if governmental action forces the removal of a billboard. Pierce Deposition at 79 and Exhibit D to Defendant's July 22 1985 Memorandum. Third, Raleigh's ordinance does not eliminate all off-premise signs, but merely restricts their size and spacing. Fourth, the city has no intention of seizing non-conforming billboards, and plaintiff will be able to salvage at least parts of those structures and use them elsewhere. Pierce Deposition at 56. And finally, all signs on Interstate and Federal Aid Primary System roadways may remain as they are. In answers to in-

terrogatories, plaintiff admitted that eighty-one of its signs located within the Raleigh zoning jurisdiction fit within that category. Thus, it is unlikely that plaintiff's business will be ruined by the new ordinance.

As stated before, ordinances which provide for amortization periods for the removal of non-conforming structures are constitutional if those periods are deemed reasonable. Plaintiff has presented no evidence other than its own opinion to support its position that the period set out in Section 10-2066.4 is not reasonable, and has also failed to show that its business will be unfairly impacted as a result of this amortization scheme. As the exercise by a municipality of its police power is generally presumed valid, and as plaintiff has failed to show that defendant's actions in enacting this ordinance have been unreasonable, the court must conclude that the five and one-half year amortization period provided in Section 10-2066.4 is reasonable as a matter of law.

Finally, plaintiff asserts that it is entitled to an extension of the amortization period because prior to the December 4, 1984 amendments, the ordinance relating to signs was unconstitutional as a matter of law. However, because the provision dealing with off-premise signs, Section 10-2066, was not unconstitutional prior to that date, and because that provision is severable from Section 10-2065, the court concludes that plaintiff is not entitled to any extension of the amortization period.

To determine whether a portion of an enactment is severable from other portions, the court must determine first whether the remaining portion is valid and enforceable on its own and second, whether there is a legislative intent to enforce the remainder. *Cavanagh v. Brock*, 577 F. Supp. 176, 181 (E.D.N.C. 1983). With respect to the second determination, it is clear that the Raleigh City Council intended to enforce all valid sections of the sign code because they included severance clauses in both Sec-

tion 10-2065 and Section 10-2066. Ordinance No. (1983) 210 TC 198, § 23; Ordinance No. (1979) 982 T.C. 96, § 48. Those clauses state that if any portion of the ordinance is held to be invalid, such invalidity will not affect other valid provisions which can be given separate effect.

Plaintiff argues that despite this language, defendant would never have enacted an ordinance relating only to off-premise signs. However, such a severability clause carries the presumption that the legislative authority *would have* enacted the remaining provisions. *Champlin Refining Company v. Corporation Commission of Oklahoma*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932). For example, in *Jackson v. Guilford County Board of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969), the North Carolina Supreme Court held that a virtually identical provision in a Guilford County ordinance did reflect the legislative intent of the Board.

> When the statute, or ordinance, could be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone. Here, the legislative body, the Board of County Commissioners, has expressly declared in the ordinance that it would have done so.

275 N.C. at 168, 166 S.E.2d at 87 (citation omitted). As with that case, it is clear that the Raleigh City Council intended that all valid provisions of its sign ordinance should continue to remain in effect even if other portions are declared invalid.

With respect to the first question, it is also clear that Section 10-2066 is valid and enforceable on its own. *Metromedia* only prohibits a municipality giving preference to commercial speech over non-commercial speech. It does not prohibit the regulation of certain types of commercial speech while not regulating others. Even if

Raleigh's on-premise sign ordinance was unconstitutional prior to December, 1984, there is no constitutional prohibition against regulating off-premise signs while failing to regulate on-premise signs.

Therefore, the severability clause in Section 10-2066 is valid. Consequently, the five and one-half year amortization period in that ordinance properly began to run against plaintiff's off-premise signs as of October, 1983, and plaintiff is not entitled to any extension of that period. Accordingly, for the reasons set out herein, defendant's motion for summary judgment is granted.[5]

CONCLUSION

In conclusion, it is hereby

ORDERED that plaintiff's motion for summary judgment be denied, defendant's motion for summary judgment be granted, and this action be dismissed.

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[5] Plaintiff also argues that it intends to seek attorney's fees due to the fact that the December, 1984 amendments to Section 10-2065 were a direct result of this lawsuit being filed. However, this motion has not yet been filed, and the parties have not fully addressed the issues in their memoranda. Therefore, the court will refrain from considering this question until such time as a motion is filed and the issues have been briefed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2093

MAJOR MEDIA OF THE SOUTHEAST, INC., *etc.*,
Appellant,

versus

CITY OF RALEIGH,
Appellee,

OUTDOOR ADVERTISING ASSOC. OF AMERICA, INC.,
Amicus Curiae.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Franklin T. Dupree, Jr., District Judge

[Filed July 17, 1986]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Wilkinson and Judge Butzner.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-185

MAJOR MEDIA OF THE SOUTHWEST, INC.,
d/b/a NAEGELE OUTDOOR ADVERTISING COMPANY
OF RALEIGH-DURHAM,
Applicant,

v.

CITY OF RALEIGH, NORTH CAROLINA

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including December 14, 1986.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 15th day of September, 1986.

APPENDIX E

RALEIGH CITY CODE

Sec. 10-2002. Definitions.

* * * * *

Nonconforming sign. Any sign, including signs approved by the board of adjustment, which was lawfully erected and maintained prior to such time as it came within the purview of this chapter and any amendments thereto, but fails to conform to all applicable regulations and restrictions of this chapter.

Off-premise sign. Any sign or structure, pictorial or otherwise, regardless of size or shape which directs attention to a business, commodity, attraction, profession, service, or entertainment conducted, sold, offered, manufactured, existing, or provided at a location other than the premises where the sign is located or to which it is affixed. Sometimes called non-point-of-sale sign.

On-premise sign. Any sign or structure, pictorial or otherwise, regardless of size or shape which directs attention to a business, profession, commodity, attraction, service, or entertainment conducted, offered, sold, manufactured, existing, or provided at a location on the premises where the sign is located or to which it is affixed.

Sec. 10-2065. On-premise signage.

Purpose. Signs are herein regulated in the interest of promoting traffic safety, safeguarding public health and comfort, facilitating police and fire protection, preventing adverse community appearance and the overcrowding of land, and protecting the character of the area in which they are located. The regulations are designed to permit maximum legibility and effectiveness of signs and to prevent their overconcentration, improper placement, and excessive height, bulk and area. In general, it is intended

that signs of a general commercial nature be prohibited in areas where commercial activities are prohibited and that signs in less restrictive business and industrial areas be regulated to the extent necessary to protect the character of the area and to conserve property values. Further, that because aesthetic value of the total environment does affect economic values of the community, and the unrestricted proliferation of signs can and does detract from the economic value of the community, it is the intent of this chapter to provide limiting controls, where necessary, to preserve community scenic, economic, and aesthetic values.

Sec. 10-2065.4. Permitted signs.

Any sign authorized in this chapter is allowed to contain noncommercial copy in lieu of any other copy.

Sec. 10-2066. Off-premise signage (outdoor advertising signs).

Purpose: For the purpose of regulating excess signage, encouraging the positive economic development of the city, promoting the safety of the traveling public, protecting existing property values in both residential and nonresidential areas, preventing the overcrowding of land, promoting a positive community appearance as part of a concerted city-wide effort to protect and enhance the aesthetics of the capital city for the enjoyment of all ciitzens of North Carolina, outdoor advertising signs are herein regulated.

The regulations are designed to prevent their overconcentration, improper placement, and excessive height, bulk, number, and area. It is recognized that, unlike on-premise identification signs which are in actuality a part of a business, outdoor advertising is a separate and distinct use of the public thoroughfare. With a view to this distinction, outdoor advertising signs are regulated differently from on-premise signs. It is intended

that outdoor advertising signs be located away from residential areas, and that such signs be regulated to protect the character of the area wherein outdoor advertising signs are located, and to conserve property values in these areas.

Sec. 10-2066.1. Design regulations.

All outdoor advertising signs shall be consistent with all definitions and shall comply with all standards and regulations of this Code. Except for ordinary maintenance, poster panel replacements, copy changes, or repair not involving structural, material, or electrical changes, no outdoor advertising signs, or part thereof, shall be erected, altered, constructed, changed, converted, re-erected, additionally illuminated, reduced in size, enlarged, or moved unless the entire outdoor advertising sign and structure are brought into conformity with this Code.

1. **Area of outdoor advertising signs.** No outdoor advertising sign facing streets with four (4) or more traffic lanes may exceed one hundred and fifty (150) square feet; outdoor advertising signs facing streets with fewer than four (4) traffic lanes may not exceed seventy-five (75) square feet. * * *

* * * * *

4. **Construction standards.**

* * * * *

d. **Spacing of signs.** No part of any outdoor advertising sign shall be located less than one thousand (1,000) feet from any part of another outdoor advertising sign when located within either of two (2) two-hundred-foot corridors along each side of a roadway. * * * No part of any permitted outdoor advertising sign which is located outside of the two-hun-

dred-foot corridor areas may be located within a one-thousand-foot radius of any other outdoor advertising sign.

Sec. 10-2066.4. Nonconforming off-premise signs (amortization).

All nonconforming outdoor advertising signs shall be discontinued or made conforming (amortized) within five and one-half (5½) years from the effective date of this section (October 23, 1983) unless explicitly prohibited by state statute. All outdoor advertising signs which are made nonconforming by an amendment to this chapter, or to the official zoning map, or extension of the areas in which this section is applicable shall be discontinued or made conforming (amortized) within five and one-half (5½) years after the date of such amendment or extension, unless explicitly prohibited by state statute.